

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the matter of:

Petition to Establish Procedural
Requirements to Govern Proceedings for
Forbearance Under Section 10 of the
Communications Act of 1934, as
Amended

WC Docket No. 07-267

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES
COMMISSION AND THE PEOPLE OF THE STATE OF CALIFORNIA**

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The California Public Utilities Commission and the People of the State of California (CPUC or California) submit these comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Federal Communications Commission (FCC or Commission) on November 30, 2007 in the above-captioned docket. In the NPRM, the Commission seeks comment on a petition filed by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeod USA Telecommunications Services, Inc. (Petitioners) on September 19, 2007.

I. INTRODUCTION

In the Petition, Covad *et al* ask the FCC to consider adopting procedural rules to govern the Commission's review of petitions for forbearance pursuant to § 10 of the 1934 Communications Act, as amended (Act).¹ Specifically Petitioners urge the FCC to adopt the following rules to govern its consideration of forbearance petitions:

- A rule confirming that Administrative Procedure Act (APA) notice-and-comment rules apply to petitions for forbearance;
- A rule specifying that the forbearance petitioner has the burden of proof;
- Rules governing the format and content of forbearance petitions, including, without limitation, a complete-as-filed requirement and a requirement that the petitioner demonstrate that it has satisfied each and every component of the Section 10 test;
- Rules governing protective orders and *ex parte* filings;
- Rules encouraging state commission input; and
- Rules establishing time tables for filing.²

As discussed below, California supports many, although not all, of Petitioners' recommendations. Adopting certain procedural rules to govern

¹ Covad, *et al*. Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, WC Docket No. 07-267 (filed Sept. 19, 2007) (Petition).

² Petition Summary, p. 3.

the processing of § 10 forbearance petitions will help ensure consideration of these petitions is conducted in a fair and reasoned manner.

The FCC also seeks comment on whether to adopt procedures to govern forbearance petitions filed by commercial mobile radio service providers under § 332 of the Communications Act, as amended. California does not here address § 332 petitions, but reserves the right to address that issue in Reply Comments.

II. THE CPUC SUPPORTS THE FOLLOWING RECOMMENDATIONS

Numerous forbearance petitions are filed at the FCC each year, many of which involve fundamental provisions of the Act and the FCC's common carrier rules. Increasingly these petitions are seeking relief from core provisions of the 1996 Telecommunications Act, provisions such as §§ 251 and 271 which are of great import to the states. It is true that § 10 is intended to facilitate the elimination of outdated and unnecessary regulations. The sheer number of petitions and the complexity of many, however, require some established procedures to ensure a thorough and effective review as possible within the limited timeframe set by Congress.

California, therefore, agrees with Petitioners that the FCC should adopt the following procedural requirements to facilitate the review of and participation in section 10 forbearance proceedings.

A. Notice and Opportunity to Comment

The CPUC supports Petitioners' recommendation that the FCC formally require § 10 forbearance petitions be subject to the Administrative Procedure Act (APA) notice and comment rulemaking procedures.³ Under APA rules, agencies are required to provide adequate notice of a proposed rule and a reasonable opportunity to comment. This same due process requirement should apply to § 10 forbearance petitions. Although, to date, the Commission has provided interested parties with an opportunity to comment on forbearance petitions, for which it should be commended, it operates under no mandate to do so. California urges the FCC to formally adopt this procedural requirement so that all parties are guaranteed a right to submit comments for the FCC's consideration in its review of the relevant petition.

B. "Complete-as-Filed" Standard

California supports Petitioners' recommendation that the Commission require all § 10 forbearance petitions to be "complete-as-filed".⁴ Under such a rule, a petitioning party would be required to submit with its initial filing all evidence in support of its forbearance petition. In addition, the petitioning party would not be permitted to materially supplement its petition without

³ Petition at pp. 11-12.

⁴ *Id.* at pp. 13-18.

restarting the statutory clock. As Petitioners note, such a standard has precedent in the Bell Operating Companies § 271 proceedings, and the Commission also applies this standard to formal complaints filed with the FCC. Given the limited timeframe in which forbearance petitions must be considered, it is essential that a petitioning party include all relevant information – including all pertinent legal arguments – in its initial petition. This requirement will ensure that all interested and affected parties are put on notice of exactly what relief is being sought, are given a full opportunity to evaluate the petitioning party’s evidence in support of the requested relief, and have time to prepare effective responsive comments.

California does not, however, support restarting the clock if the petitioning party materially rescinds part of the request for relief. For example, suppose a party seeks forbearance from Title II regulation in five wire centers, but then amends the petition by eliminating one of the five wire centers from its request. Such a modification to a petition should not mandate that the clock for the FCC’s review be restarted, since the modification would reduce, not enhance, the scope of the FCC’s review. Permitting this type of material modification to forbearance petitions without affecting the timeline would be conducive to achieving regulatory efficiency, as well as to encouraging a final decision more satisfactory to all parties where the relief requested may be controversial or in dispute.

C. Meeting the Section 10 Standard

Petitioners recommend that the FCC require the petitioning party to separately demonstrate that it satisfies each component of the §10 standard.⁵ California strongly supports this recommendation. As Petitioners note, forbearance petitions often fail to address each element of the § 10 standard. Rather, petitioning parties generally just assert that the forbearance criteria are satisfied with respect to all regulations or statutory provisions from which relief is sought.⁶ As a consequence, interested parties cannot adequately respond to a petition because they do not have sufficient detail from the petitioner regarding how each element of the standard is, or is not, satisfied. The FCC's rule should provide that if the petitioning party fails to meet this requirement, the petition should be dismissed without prejudice.

D. Scope and Interpretation of Protective Orders

California agrees with the Petitioners that the FCC should require petitioning parties to make available both Confidential and Highly Confidential documents in electronic format.⁷ Electronic access will greatly enhance the ability of interested parties to timely review the supporting evidence submitted with a forbearance petition, especially as such evidence may include a voluminous quantity of documents. Petitioners have also

⁵ *Id.* at pp. 18-20.

⁶ *Id.* at p. 19.

⁷ *Id.* at pp. 21-22.

requested that the Confidential and Highly Confidential documents be made available in a searchable electronic format. The CPUC does not support requiring that the text of each such document be searchable, as such a requirement may be too burdensome for the petitioner. However, it would be useful if these papers were arranged by type of document and designated by subject category headings, and contained an index that would itself be searchable.

E. State Use of Protected Documents

California also agrees with Petitioners that States should be permitted to use in related State proceedings documents designated as Confidential and Highly Confidential. If a document is relevant to a particular proceeding or activity before the California Public Utilities Commission, the CPUC should not have to separately request the same documents from the same carrier. Requiring a state commission to separately obtain the same documents would be a waste of the time and resources, of both the state commission and the affected carrier.

F. *Ex Parte* Submissions

California supports Petitioners' recommendation that the FCC develop policies governing *ex parte* submissions in § 10 forbearance proceedings.⁸ In particular, the CPUC considers it critical that the FCC impose time limits on

⁸ *Id.* at pp. 28-29.

substantive *ex parte* submissions. California agrees with Petitioners that without a deadline for submitting substantive *ex parte* communications, petitioning parties have every incentive to delay the filing of critical information until the last minute, thereby thwarting the opportunity of interested third parties to adequately respond. California does not recommend a specific time limit for such communications; rather we leave that to the discretion of the Commission.

G. Treatment of Sections 251 and 271 Forbearance Petitions

Petitioners recommend that in proceedings where a party is seeking forbearance from §§ 251 and/or 271, the Commission should require the petitions to include all supporting data at the wire center level and relevant declarations in support of that wire center data.⁹ The FCC also should require the petition to include all data explaining the methodology employed to produce the wire-center specific data contained in the forbearance petition. If the petition does not include all empirical data relied upon by the petitioning party at the wire center level as well as all data explaining the methodologies used to develop the data, the FCC should dismiss the petition with leave to refile. California supports these recommendations. This level of detail in the data proffered to support a forbearance petition is vital for the Commission and interested parties to effectively analyze requests for

⁹ *Id.* at p. 31

forbearance from either § 251 or § 271 regulations. Without this information, it will be difficult, if not impossible, for the FCC to determine if adequate competition exists to prevent discrimination as well as to protect the public interest.

III. THE CPUC OPPOSES THE FOLLOWING RECOMMENDATIONS

A. Procedure for State Commission Input

California opposes Petitioners' suggestion that the FCC establish a procedure requiring state input to be completed *prior* to the general comment cycle on a forbearance petition. Petitioners propose that such a rule would enable interested parties to review and comment on the state analysis, presumably on a separate track from all other parties' comments.¹⁰

California does not support a separate track and time frame for comments from state commissions. Rather, the states should submit comments on the same schedule as do other parties. Given the limited time frame for analysis imposed by the statute, it is critical that states have as much time as other parties to draft comments, and to respond to the comments of other parties. Other interested parties will be able to respond to comments filed by state commissions or other state agencies in the Reply comment cycle.

¹⁰ *Id.* at pp.25-26

In conjunction with their recommendation that states submit comments on a separate track, Petitioners also propose that the states should be afforded only 90 days from the date the forbearance petition is filed in which to complete their review and present their views to the Commission. If the Commission decides to adopt a separate state track requirement, California strongly recommends that states be given longer than 90 days to review and file. In addition, any separate time frame for state submissions should begin from FCC issuance of a Public Notice, not from the date the petition is filed.

Finally, it is not clear to the CPUC exactly why Petitioners believe a separate process for state submissions is necessary. Unlike a § 271 filing, where state analysis and input were mandated by federal law and were intended to cover myriad statutory issues, a § 10 analysis is likely to be much less sweeping and complex. A state analysis of a forbearance petition does not warrant a separate, but truncated, time frame such as Petitioners propose.

B. Standard Comment Cycle

Petitioners recommend that the FCC adopt a standard comment cycle for all § 10 forbearance petitions,¹¹ and that the comment cycle begin once the FCC has completed its initial review of the petition (and the petitioning party

¹¹ *Id.* at pp.27-28.

has cured any non-material procedural defects). The comment cycle would commence only after the applicable states have been given the opportunity to provide their input, and after the FCC has disposed of any motions to dismiss. Only then would commenters be afforded 45 days to file comments, with reply comments due 30 days after initial comments are submitted.

California opposes these recommendations. Rather, the CPUC proposes that the FCC adopt a more flexible approach, allowing for the setting of comment deadlines appropriate to the scope of the petition.

IV. CONCLUSION

For reasons set forth above, the CPUC supports in part and opposes in part the petition filed by Covad *et al.* California does strongly support FCC adoption of procedures for processing of forbearance petitions filed pursuant to § 10. Rules for these petitions will provide all parties a template for how the FCC will approach its evaluation of such petitions. And, most importantly, the CPUC strongly urges the FCC, in all instances where it is presented with a § 10 petition, to issue a decision which provides to all parties clear direction on the Commission's intent.

Respectfully submitted,

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